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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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*
UNITED STATES OF AMERICA *
* v. * 06-cv-354-PB
* GENERAL ELECTRIC COMPANY * November 6, 2008
* * * * * * * * * * * * * * * * *

DAY 3
AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

For the Government: Catherine A. Fiske, Esq.
Peter M. Flynn, Esq.
Laura J. Rowley, Esq.
Donald G. Frankel, Esq.
U.S. Department of Justice
Environmental Enforcement Section

For the Defendant: Peter A. Biagetti, Esq.
William M. Cowan, Esq.
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, PC

Thomas H. Hill, Esq.
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Court Reporter: Sandra L. Bailey, CSR, CRR
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	I N D E X				
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4	Witness	Direct	Cross	Redirect	Recross
5	ALBERT CLARK				
6	By Mr. Biagetti	5			
7	By Ms. Rowley		22		
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1 BEFORE THE COURT

2 THE COURT: Did you want to deal with the
3 Exhibit 35 issue now or do you want to finish with the
4 testimony of this witness and then deal with the
5 exhibit?

6 MR. COWAN: Your Honor, we will deal with it
7 very briefly in a manner I think you'll find to your
8 liking hopefully.

9 THE COURT: All right.

10 MR. COWAN: Ms. Fiske and I have discussed the
11 matter. Your Honor, we will withdraw our objection but
12 it's specifically agreed, with the court's willingness,
13 to allow, if you will, counter highlighting designating
14 those portions in the memo with a -- well, I'll
15 represent to your Honor, this will not be, I'm going to
16 highlight everything else, this is going to be quite
17 judicious and we pledge to get that to you by 5 p.m.
18 today.

19 THE COURT: I think that's useful because as I
20 was thinking through the issue whether it was sponsored
21 or not, it would seem that there would be a strong
22 argument for the admission of the document under the
23 residual exception to the hearsay rule because this
24 clearly is, from GE's perspective, one of the best most
25 reliable compilations of evidence as to what actually

1 happened, it's something that the company carefully
2 prepared in anticipation of litigation where errors that
3 were damaging to GE, the company would have taken care
4 to avoid, so I think from GE's perspective it's probably
5 the best available evidence we have as to what really
6 was going on at that site in the details of the
7 manufacturing process and the way that waste was
8 treated, and in that sense I think it's highly useful to
9 both sides just to give me the background information
10 that I need, so, I think that's good way to resolve it.

11 I guess what I would say to you is this. It
12 looks to me like, despite my best efforts, GE's going to
13 get its wish here because you've given me so much stuff
14 to read that I can't read it this afternoon, I'm going
15 to have to read it Friday and over the weekend. So I
16 think realistically you're going to have to come back
17 Monday and make your closing arguments. It's just too
18 much stuff for me to read. I mean, I know it wasn't
19 your conscious strategy to burden me.

20 MR. BIAGETTI: We had two purposes, judge, you
21 may have heard that, but I thank you.

22 THE COURT: So we're going to have to have the
23 closing argument on Monday.

24 MR. COWAN: Well, your Honor, with that
25 realization, respectfully may I have until tomorrow

1 morning to provide --

2 THE COURT: Yeah, give it to me tomorrow
3 morning, submit it. You don't even need to come in
4 tomorrow, today just designate what you want me to read,
5 and I'll read whatever you want me to read, and then
6 Monday you can come in and we will do the closing
7 arguments on Monday. So if you get it to me, you don't
8 have to physically be here, my sense is you can all go
9 home for the weekend and just come back on Monday, and
10 so anything you need to do with me about the documents,
11 deal with it today, and I'll read the stuff on Friday
12 and over the weekend to the extent necessary, then I'll
13 be in a position to rule on Monday, you can make closing
14 arguments, and then I'll rule.

15 You can see my style. When you're making your
16 closing arguments, expect to be interrupted and to be
17 asked a bunch of questions, or asked to respond to
18 argument. Just talking to me isn't that useful. I like
19 dialogue.

20 Okay, so you want to bring the witness back
21 and we will finish.

22 MR. BIAGETTI: Thanks, judge.

23 DIRECT EXAMINATION cont'd

24 BY MR. BIAGETTI:

25 Q. Good afternoon, Mr. Clark.

1 A. Good afternoon.

2 Q. We were talking about Mr. Fletcher's letter
3 and your reactions to it before we broke for lunch. Mr.
4 Fletcher in his letter to you also concluded with a
5 paragraph about as far as future sales are concerned.

6 Do you see that one?

7 A. Yes, I do.

8 Q. And do you remember reading that one at that
9 time?

10 A. That he wants to leave the door open to resume
11 purchasing these drums of scrap Pyranol from us.

12 Q. And did you view that as a good or bad thing?

13 A. That's a good thing.

14 Q. Why is that?

15 A. That would be generating some income to GE.

16 Q. Now --

17 A. As opposed to having to pay for disposal of
18 it.

19 Q. You mentioned before lunch, I think, that
20 there were a couple of reasons why you wanted Fletcher
21 to resume buying. You said it was -- we can make a
22 little money, but also we were running out of room.

23 Have I got that basically right?

24 A. That was two factors.

25 Q. Did you consider at the time any other options

1 for solving the part about running out of room in the
2 storage area?

3 A. Other options were to have a chemical disposal
4 company pay -- GE pay them to dispose of the material.
5 Another option was if we're running out of room, finding
6 more room until the financial problems or such were
7 resolved, and until he could start taking, buying more
8 Pyranol from us.

9 Q. Do you recall whether you explored either one
10 of those options?

11 A. I did not personally explore any of those
12 options. I held out for the resumption of sales to
13 Fletcher.

14 Q. Why hold out for that rather than explore one
15 of those other two options you just mentioned?

16 A. Highest probability of success was staying
17 with Fletcher. He had a use for the material. We had a
18 good relationship for 15 years. It was the easiest
19 safest thing to stay with Fletcher. We would continue
20 to get payment for the material that he took and for
21 material he could use in his product. It just made good
22 business sense to do everything we could to stay with
23 Fletcher.

24 Q. I'm going to show you next a document that has
25 already been admitted, judge, as GE Exhibit 14. It

1 appears to be a memo from E. Jones to you, Mr. Clark,
2 dated February 8, 1968, asking if you would, the last
3 paragraph, see what action can be taken toward
4 collecting this balance, meaning the sale of used
5 Pyranol to Milford Paint Works. Have you seen that
6 document?

7 A. Yes.

8 Q. Have you seen it before?

9 A. Yes.

10 Q. Do you recall getting that?

11 A. Again, I surmise I got it.

12 Q. Do you have any memory as you sit here today
13 that in 1968 you got a copy of it?

14 A. I got that copy.

15 Q. What, if anything, did you do in response to
16 this request from Mr. Jones that you take some action
17 toward collecting this balance?

18 A. Very shortly after we got this letter we
19 received a February letter from Fletcher raising
20 concerns about quality. At the time that this letter
21 was written, February 8, 1968, we had not heard anything
22 of any problems with quality of the product sold to
23 Fletcher, bought by Fletcher, so we were -- we hadn't
24 taken any action on this, but we received the
25 February 16th letter which we talked about just a few

1 minutes ago where he raises the whole list of alleged
2 problems with quality.

3 THE COURT: Could I have my clerk get me
4 Defendant's Exhibit 14, is it?

5 MR. BIAGETTI: Yes, 14.

6 Q. And so what if anything did you do in
7 immediate response to getting this memo?

8 A. I remember talking with my boss, Rob Abbe,
9 bringing this into the equation of things to consider.
10 Not necessarily to react directly with Fletcher on
11 receipt of this, but again, to take Mr. Jones' concerns
12 about the balance owed to GE, take that into
13 consideration for solving multiple problems we were
14 having with scrap Pyranol.

15 Q. And I think your testimony before the break,
16 but I want to make sure I'm correct, is that after the
17 call with Fletcher you never had a conversation with
18 him, is that right?

19 A. No, I did not.

20 Q. Or anybody else at Fletcher Paint?

21 A. Not to my knowledge.

22 Q. Now, there's a handwritten note on this
23 exhibit, Mr. Clark, I'll zoom in on it as best I can,
24 that I believe says per Al Clark. Monsanto Chem is
25 analyzing similar material and on basis of their report

1 he will make a decision on validity of Milford Paint
2 Works claim. See attached letter. And again it's from
3 E. Jones, dated May 28, 1968. Do you see that?

4 A. Yes, I do.

5 Q. Does that refresh your memory as to what this
6 Monsanto analysis was that's being referenced here?

7 A. Yes, it does.

8 Q. What was it?

9 A. The conversations between all our management
10 team were centered around trying to resolve the problem
11 of unpaid bills for material and also to resume sale of
12 this material to Fletcher's Paint. Mr. Barker was the
13 senior buyer who had dealt with Monsanto Chemical
14 Corporation in the purchase of Aroclor which was
15 converted by whatever process we needed, Pyranol out of
16 it, and so Mr. Abbe and Mr. Barker had a conversation
17 that I heard about afterwards. I was not present at
18 this conversation, but I was told about it. That Mr.
19 Barker was going to ask Monsanto --

20 MS. ROWLEY: Objection.

21 Q. Mr. Clark, Mr. Clark, let me ask you the next
22 question. Do you know who, if anybody at GE, requested
23 the analysis?

24 A. Who requested the analysis?

25 Q. Yes, sir, did you?

1 A. No, it was not me.

2 Q. Do you know who it was?

3 A. It was Mr. Barker.

4 Q. Okay. Did you know why it was requested?

5 A. To attempt to validate or disprove the
6 statements in Mr. Fletcher's letter dated February 16th.

7 Q. Did you agree or disagree with that?

8 A. I thought it had merit. I thought it was a
9 good chance that we could learn something from that
10 examination of material.

11 Q. Did you have any personal involvement in the
12 analysis done?

13 A. I don't know anything about the analysis. I
14 was not present and I don't know when it was.

15 Q. Setting aside the methodology of the analysis,
16 do you know anything about the material that was tested?

17 A. All that I can say I know about the material,
18 it was material in drums still located at Hudson Falls
19 in the storage yard, left behind for whatever reason in
20 Hudson Falls, and it was not from any of the material
21 that had been taken by Fletcher and was located at the
22 Fletcher Paint Works.

23 Q. Do you know whether or not GE paid Monsanto to
24 do the analysis?

25 A. I don't know. I can offer an opinion, but if

1 that's not allowed, I won't.

2 Q. Did you ever, in your department in the bills
3 that you handled, ever see anything from Monsanto on
4 this subject?

5 A. No, I did not.

6 Q. Did you ever learn anything about the results
7 of the Monsanto analysis?

8 A. Yes, I did.

9 Q. What did you learn?

10 A. I learned that there was some evidence that
11 some of the things that were in Mr. Fletcher's letter
12 did exist in the samples that were still at Hudson
13 Falls.

14 Q. And when you say some of the things mentioned
15 in Mr. Fletcher's letter, and just to recap, he said
16 that some of the drums were one-quarter or one-half
17 full. Was that one of the things that was the result of
18 the analysis?

19 A. No, that was not.

20 Q. He said that some of the drums were more than
21 one-half water. Was that part of the Monsanto analysis?

22 A. Yes, he found some water.

23 Q. He said that something had been added to
24 neutralize the Pyranol. Was that --

25 A. That never came up. It was never mentioned.

1 Q. He said that the drums contained a coal tar
2 emulsion which turned the Pyranol black. Did that come
3 out of the Monsanto analysis?

4 A. It did not.

5 THE COURT: Counsel, I just want to be sure
6 I'm not missing something. The Monsanto analysis is,
7 there's a document that is the Monsanto analysis, right?
8 Don't we have a document that reflects the results of
9 the Monsanto analysis?

10 MR. BIAGETTI: We have a memorandum from Mr.
11 Clark which is coming up next, but it's not the results
12 of -- it's not a Monsanto document or --

13 THE COURT: So we don't have the actual
14 results of Monsanto, we have Mr. Clark's report of the
15 results?

16 MR. BIAGETTI: Yes, we have a memorandum
17 coming up next, yes.

18 THE COURT: I mean, wasn't there something
19 from Monsanto to Clark, somebody at GE?

20 MR. BIAGETTI: I'll ask him.

21 Q. BY MR. BIAGETTI: Did you ever see any written
22 report from Monsanto?

23 A. All I received was a verbal report from Mr.
24 Barker. I saw nothing in writing.

25 THE COURT: So Mr. Barker is from Monsanto?

1 A. Mr. Barker is my counterpart for GE who buys
2 the material, who bought the Aroclor from Monsanto.

3 THE COURT: I'm confused. Get out the memo,
4 please.

5 MR. BIAGETTI: Yes. If I'm anticipating your
6 Honor correctly, this is Defendant's Exhibit 17. It's a
7 memo by Mr. Clark, and it talks about in the second
8 paragraph a review of this problem and analysis of this
9 material by Monsanto.

10 THE COURT: Okay. So what he's talking about
11 now is, he's talking about the -- I'm confused. You
12 have to go through the whole line of questioning again
13 because I don't understand it.

14 Q. BY MR. BIAGETTI: Okay. You mentioned that
15 you did get a verbal report on the results?

16 A. I got this information verbally from Mr.
17 Barker.

18 Q. Okay. And what did you conclude once you got
19 that information from him about the results of the
20 Monsanto analysis?

21 A. Two of the points that Mr. Fletcher --

22 THE COURT: Can I ask you, is what's in that
23 memo on the screen, what you concluded?

24 A. Yes, right here, that's what I was going to
25 say.

1 MR. BIAGETTI: I was asking for his
2 independent memory, but I can certainly refresh it with
3 this.

4 THE COURT: He's not going to remember.

5 Realistically, this is many, many, many years ago, he's
6 not going to remember what the analysis was about. He's
7 going to look at the document which is the only thing we
8 have, and that may refresh your memory somewhat. For
9 the most part, is what you know about the Monsanto
10 analysis in that document?

11 A. Yes.

12 THE COURT: Okay.

13 A. And I do recall it. I do have a recollection.
14 I do have a recollection about that document only
15 because the amount of time I spent carefully thinking
16 through the response to finance, talking it through Mr.
17 Abbe, my boss, we formulated the information based on
18 the information collected from -- that Monsanto gave to
19 Mr. Barker, our buyer, our senior buyer, and the two
20 points that we agreed we found evidence were, there was
21 water in the drums and there was some amount of
22 trichloroethylene. I don't remember where the
23 22 percent came from. I don't remember that. But I
24 know that there was evidence they found some
25 trichloroethylene in the drums, they found some water in

1 the drums. Those are the two.

2 THE COURT: Okay.

3 MR. BIAGETTI: Thank you, and thank you, your
4 Honor.

5 Q. BY MR. BIAGETTI: So, let's stick with this
6 document now, Mr. Clark, which is GE Exhibit 17, a memo
7 from you to Mr. Humphrey, the manager of general
8 accounting on August 6, 1998. And it's approved by your
9 boss, Mr. Abbe; right?

10 A. That's correct.

11 Q. Who wrote the memo?

12 A. I authored it. I wrote it.

13 Q. Did anyone approve it?

14 A. Mr. Abbe approved it prior to him saying it.

15 He knew what I was going to write.

16 Q. Did you have discussion with Mr. Abbe before
17 sending this to Mr. Humphrey?

18 A. Several.

19 Q. And you mention here that there was a review
20 of this problem and an analysis of the material by
21 Monsanto; correct?

22 A. Correct.

23 Q. You've already testified to what you did in
24 that regard for his Honor; correct?

25 A. Correct.

1 Q. And you conclude by saying it is our
2 recommendation that the outstanding accounts receivable
3 in the full amount of \$6,993.75 be written off. What
4 was the basis for that recommendation?

5 A. The biggest motivation was to retain Fletcher
6 Paint Works as a customer of GE, and we felt that there
7 was enough evidence that some of the things he claimed
8 could be true, and that to write off the \$7,000 figure
9 was to follow up on Mr. Fletcher's offer to continue to
10 resume this agreement and arrangement in the future, and
11 it was our motivation to keep the door open and to use
12 several words that others used, keep the door open for
13 resuming the arrangement where he would buy scrap
14 Pyranol from GE.

15 THE COURT: Can I ask you a question about
16 your memo. In the second paragraph there you say
17 through a review of this problem and an analysis of this
18 material by Monsanto, I want you to tell me as best you
19 can, when you use the phrase this material, what were
20 you referring to?

21 A. Material that was in our parking storage --
22 our storage yard in Hudson Falls.

23 THE COURT: So it was your understanding that
24 what had been sent to Monsanto to analyze was --

25 A. Can I stop, please.

1 THE COURT: Yes.

2 A. Nothing was sent to Monsanto to analyze.

3 THE COURT: Oh, well, then, how did Monsanto
4 do the analysis without looking at the material?

5 A. He looked at the material. He was in Hudson
6 Falls.

7 THE COURT: He came and took samples?

8 A. He did the examination at our plant in our
9 storage yard, yes.

10 THE COURT: So when you refer to this
11 material, you're referring to material that was in the
12 scrap Pyranol area at the plant?

13 A. Correct.

14 THE COURT: And your recollection or your
15 understanding was at the time, that the man from
16 Monsanto came out and took his own samples?

17 A. Correct.

18 THE COURT: Were you there when that happened?

19 A. No, I was not.

20 THE COURT: So it's an understanding you have
21 from somebody else?

22 A. Mr. Barker.

23 THE COURT: I see, okay.

24 A. Okay.

25 THE COURT: All right.

1 Q. BY MR. BIAGETTI: Did you have a belief at
2 that time about the material that Fletcher had opposed
3 to what Monsanto sampled?

4 A. I had a firm belief that we did not allow him
5 to take half full drums of scrap Pyranol. I can't
6 believe that we let him take drums of Pyranol that had
7 22 percent TCE.

8 Q. When you say you can't believe?

9 A. The controls and processes --

10 THE COURT: Sustained.

11 A. -- we had in time should prevent that.

12 THE COURT: Sustain the objection.

13 Q. Do you recall what your belief, if any, on
14 that subject was at the time that you wrote this memo?

15 MS. ROWLEY: Objection.

16 Q. Okay, I'll move on. What if anything -- well,
17 let me ask you. There's a notation as well on
18 Exhibit 17, handwriting on the lower right, discussed
19 with DSB on 8/13/68, okay to write off, and then
20 someone's initials which could be DWH, but I'm not sure.
21 Do you see that?

22 A. Yes, I see that.

23 Q. Who is DSB?

24 A. Donald S. Bates, manager of finance for the
25 capacitor department.

1 Q. Did you have discussion with Mr. Bates?

2 A. No, I did not.

3 Q. Do you know what, when it says okay to write
4 off, do you recall what -- well, did you ever have any
5 discussion with anybody else after writing this memo
6 about whether or not there would indeed be a write-off?

7 A. No, I didn't.

8 Q. When did you move on to your next job in GE?

9 A. In August of 1968.

10 Q. Do you remember how much longer after
11 August 6th?

12 A. Not much longer.

13 Q. Where was the new job again, I'm sorry?

14 A. Specialist manufacturing information systems
15 for the same department.

16 Q. In the same building?

17 A. Same building, and Mr. Abbe was still my new
18 manager's boss.

19 Q. Okay. Still have conversations with Mr. Abbe
20 after moving to the new job?

21 A. I don't recall any conversations about the
22 scrap Pyranol with him after I went on the new job.

23 Q. All right. And how long were you at Hudson
24 Falls after you moved to the new job?

25 A. I left Hudson Falls in '73 to go to Virginia.

1 Q. Did you ever hear from Mr. Fletcher again?

2 A. Never.

3 Q. Did that seem like a good or bad thing to you
4 or never occurred to you?

5 A. It sounded good because by him not pursuing
6 the issues any further, it was taken by us to mean he
7 accepted the write-off.

8 Q. Was there ever a time --

9 MS. ROWLEY: Objecting, speculation.

10 THE COURT: I'm not going to attach any
11 significance to it.

12 Q. Was there ever a time up until the time you
13 made this recommendation that you thought that Mr.
14 Fletcher was going to dump or discard any of the Pyranol
15 that he picked up from GE?

16 A. I never had that idea at all, not with our
17 dealings with him from the past, no, I never expected he
18 would do that. Never even thought about it. Never even
19 considered that would be an action he might take.

20 THE COURT: I think there's a dispute between
21 the parties here, sir, as to whether after this write-
22 off, whether Fletcher purchased additional Pyranol from
23 GE. Do you have any actual knowledge of whether he did?

24 A. I have no knowledge of what he did after I
25 left -- after the write-off.

1 THE COURT: After the write-off.

2 MR. BIAGETTI: If I could have just a second.

3 (Pause.)

4 Q. BY MR. BIAGETTI: Did you ever learn for
5 certain whether or not the debt was indeed written off
6 by GE?

7 A. I never learned of that, no.

8 MR. BIAGETTI: Okay, nothing more, thanks.

9 THE COURT: Thank you. Cross-examination.

10 CROSS-EXAMINATION

11 BY MS. ROWLEY:

12 Q. Good afternoon, Mr. Clark.

13 A. Good afternoon.

14 Q. Mr. Clark, you stated earlier that at the time
15 you received the letter from Mr. Fletcher your reaction
16 was disbelief; right?

17 A. That's correct.

18 Q. You thought that he was trying to get out of
19 paying his bill?

20 A. That's correct.

21 Q. And essentially you believed he was telling a
22 lie when he stated that a large percentage of the drums
23 he had were garbage, is that right?

24 A. I did not believe that.

25 Q. Okay. And after receiving Mr. Fletcher's

1 letter, GE had someone from Monsanto test the drums,
2 test some drums of scrap Pyranol; correct?

3 A. That's not true.

4 Q. You didn't have someone from Monsanto --

5 A. I did not --

6 THE COURT: Excuse me, sir, wait a minute.

7 Only one person can talk at a time. So until she
8 finishes asking her question, you can't begin your
9 answer.

10 A. Correct.

11 THE COURT: Put a question to the witness,
12 please.

13 Q. Sure. We just got done discussing that after
14 you received the letter from Mr. Fletcher, GE had
15 someone from Monsanto test drums of the scrap Pyranol
16 that were still at GE; correct?

17 A. Someone from what company?

18 Q. Monsanto.

19 A. Monsanto, yes, that is true.

20 Q. And the person from Monsanto found that the
21 material it tested contained anything from water to
22 trichloroethylene; correct?

23 A. That's correct.

24 Q. And in your words you wrote a memo that said
25 that Milford had a valid claim; correct?

1 A. Had a valid claim is my words, yes.

2 Q. Okay. And you wrote that the material that GE
3 had sent to Fletcher's, quote, should have been disposed
4 of. Is that right?

5 A. If it was like that, yes.

6 Q. And looking at your memo, you used the phrase
7 acceptable method of disposal; correct?

8 A. Correct.

9 Q. And by that term, acceptable method of
10 disposal, you meant you should have paid someone to
11 dispose of it; correct?

12 A. We would have to pay a chemical disposal firm
13 to dispose of it, yes.

14 Q. Send it to something like send it to a
15 landfill?

16 A. I didn't hear you.

17 Q. Does that mean you would have sent it to a
18 landfill?

19 A. No, no, no.

20 Q. You would have paid a chemical disposal
21 company to take it away?

22 A. Correct, it would have been -- Monsanto is not
23 a chemical disposal firm. It would have been a chemical
24 disposal company, and again, we didn't do it, so I can't
25 supply who it would be.

1 Q. And your conclusion in this memo is that
2 sending this scrap Pyranol to Milford had saved GE
3 money; correct?

4 A. Correct.

5 Q. And the amount of money that it saved GE was
6 \$3,248; correct?

7 A. That's as an alternative, yes.

8 Q. And Mr. Clark, it's true that GE wanted to
9 keep selling scrap Pyranol to Mr. Fletcher?

10 A. That is true.

11 Q. It's fair to say you would have been happy to
12 have Mr. Fletcher come back and take more scrap Pyranol?

13 A. Yes.

14 Q. I'd like to look at Mr. Fletcher's letter
15 again. The second page. Could you look at the fifth
16 and sixth paragraph on this page. Actually that's not
17 what I -- sorry. The second to last paragraph.

18 A. As far as?

19 Q. Yes, would you take a look at that paragraph.

20 A. Okay.

21 Q. Mr. Fletcher is discussing future sales and he
22 mentions that it wouldn't be worth it for him to haul
23 more scrap Pyranol unless GE can, quote, tighten up as
24 to what is Pyranol and what is not and furnish
25 reasonably clean drums.

1 Mr. Clark, GE did not make any changes to the
2 way it collected and stored scrap Pyranol in order to
3 respond to Mr. Fletcher's comment, did it?

4 A. Yes.

5 Q. It did not or did?

6 A. Ask the question again.

7 Q. Did GE make any changes to the way that it
8 collected or stored scrap Pyranol in response to Mr.
9 Fletcher's comment here?

10 A. No.

11 MR. BIAGETTI: Objection, only because he said
12 I believe on direct that he had no direct personal
13 knowledge of how it was collected.

14 THE COURT: I think that's true. I take it as
15 he doesn't really know.

16 A. That's the real answer, I don't really know.
17 On the other hand, I don't know of anything that was or
18 was not changed. My belief is that nothing was changed
19 because it didn't need to change, but that's my belief.

20 Q. Because there was nothing to tighten up?

21 A. That's correct.

22 Q. Because scrap Pyranol is scrap material;
23 correct?

24 A. That's correct.

25 Q. And it was not intended to be pure; correct?

1 A. That's correct.

2 Q. And by definition scrap Pyranol could contain
3 impurities?

4 A. It's of no further use to General Electric in
5 manufacturing capacitors.

6 Q. Was that a yes or no? You said it was no use
7 to GE but the question was the --

8 A. The answer --

9 MR. BIAGETTI: Objection.

10 THE COURT: Whoa, whoa whoa.

11 A. I think --

12 THE COURT: Wait, wait. Sir, sir, can I tell
13 you, I got to run things, so if I tell you to stop,
14 please stop, okay. Let's have counsel ask a question
15 again. Before she -- you answer, let's give defense
16 counsel chance to object. So ask your question again.

17 Q. Okay. Scrap Pyranol could contain impurities;
18 correct?

19 A. I don't understand your question.

20 THE COURT: You don't understand the question
21 isn't it true that scrap Pyranol contains impurities? I
22 think that's a given. That part is easy. We haven't
23 got to the hard part yet. Everybody knows scrap Pyranol
24 contains impurities.

25 A. Exactly. I don't understand the question.

1 THE COURT: Don't worry about trying to be
2 trapped. Just try to answer the question that's asked.

3 A. The answer is yes, it does have impurities and
4 everybody knew it.

5 Q. Okay. After this memo recommending a
6 write-off, you never called Mr. Fletcher to ask what
7 they were going to do with the scrap Pyranol, did you?

8 A. No, I did not.

9 Q. So you didn't confirm with him whether he
10 could use the material that he complained about in his
11 letter, did you?

12 A. I'm having a hard time understanding.

13 THE COURT: I think he's having trouble
14 hearing the words. It's not so much the matter of
15 understanding.

16 A. I can't hear.

17 THE COURT: Can't hear.

18 A. Try again, please.

19 Q. Okay. You didn't confirm with Mr. Fletcher
20 that whether or not he could use the material that he
21 complained about in his letter, did you?

22 A. That's right, yes, I did not confirm.

23 Q. Okay. And you left the decision on how
24 ultimately to dispose of that scrap Pyranol with Mr.
25 Fletcher; correct?

1 A. Correct.

2 Q. Okay. Mr. Clark, is it fair to say that you
3 personally didn't know much of anything about Fletcher's
4 Paint Works?

5 A. That's fair to say.

6 Q. To your knowledge the company manufactured
7 paint?

8 A. Correct.

9 Q. And you assumed Fletcher's to be a small paint
10 company; correct?

11 A. Yes, I did.

12 Q. Local to New Hampshire?

13 A. Yes, I did.

14 Q. And beyond that you didn't know anything else
15 about the company?

16 A. I did not, no.

17 Q. And you never tried to find out; correct?

18 A. I never found out -- never tried to find out.

19 Q. And you once had a telephone conversation with
20 Mr. Fletcher; correct?

21 A. What -- ask the question again.

22 Q. You once, at least once you had a telephone
23 conversation with Mr. Fletcher?

24 A. At least once.

25 Q. January 1968?

1 A. Yes.

2 Q. And you were on the telephone with him and you
3 spoke with him about whether or not he could use anymore
4 scrap Pyranol; correct?

5 A. That's right.

6 Q. Okay. But during this telephone conversation
7 you never asked Mr. Fletcher what he was using scrap
8 Pyranol for, did you?

9 A. No, I did not.

10 Q. When you were a senior buyer of indirect
11 material, GE was manufacturing a lot of power
12 capacitors, wasn't it?

13 A. That's right.

14 Q. And that caused GE to generate a lot of scrap
15 Pyranol?

16 A. Yes, it did.

17 Q. And GE had more scrap Pyranol than Fletcher's
18 could take from you; correct?

19 A. More than he could use, yes.

20 Q. Okay. And at that time you were working with
21 another buyer, Mr. Barker?

22 A. Yes.

23 Q. All right. And you and Mr. Barker made some
24 effort to try and find other outlets besides Fletcher's
25 that might want to take scrap Pyranol, didn't you?

1 A. That's true.

2 Q. Okay. And among your efforts was a telephone
3 call to Monsanto; correct?

4 A. I did not make a telephone call to Monsanto.

5 Q. Mr. Barker made the call?

6 A. It would have been Mr. Barker.

7 Q. Okay. And Monsanto had no advice to offer you
8 on how to get rid of the scrap Pyranol?

9 A. That's what Mr. Barker told me.

10 Q. Okay. And your efforts also included a
11 telephone call to GE's internal consultants in
12 Schenectady, New York; right?

13 A. I have no knowledge of that.

14 Q. You don't recall the telephone call?

15 A. I never called.

16 Q. Okay. However, in your efforts to find other
17 outlets for scrap Pyranol, you personally never
18 approached another paint company to ask if they would be
19 interested in scrap Pyranol?

20 A. No, I did not.

21 Q. And to your knowledge Mr. Barker did not do
22 that either?

23 A. To my knowledge he did not.

24 Q. Okay. At the time you were a senior buyer for
25 indirect materials, you weren't familiar with the term

1 plasticizer, were you?

2 A. No, I was not.

3 Q. You were familiar with the term Aroclors;
4 correct?

5 A. Yes, I was.

6 Q. But you weren't familiar with various types of
7 Aroclors, were you?

8 A. No, I wasn't, if there were different types.

9 Q. And at the time you were a senior buyer, you
10 didn't know whether Aroclors could be used to
11 manufacture paint, did you?

12 A. Ask the question again, please.

13 Q. At the time you were a senior buyer, you
14 didn't know whether Aroclors could be used to
15 manufacture paint, did you?

16 A. I didn't know that, no.

17 Q. During your time as senior buyer for indirect
18 materials there was some chemicals that GE paid to
19 dispose of; correct?

20 A. That's correct.

21 Q. And one of those materials was
22 trichloroethylene, wasn't it?

23 A. That's correct.

24 Q. Okay. While you were senior buyer of indirect
25 material, is it fair to say that GE had no restrictions

1 on selling scrap Pyranol to Fletcher's?

2 A. That's correct.

3 Q. Okay. Whatever he could take, you would let
4 him take?

5 A. That's correct.

6 Q. So any kind of scrap Pyranol would be -- any
7 kind of scrap Pyranol would be sold to Fletcher's;
8 correct?

9 A. Anything that he agreed to take and pay us
10 for. It wasn't a one way decision, it was a mutual
11 decision.

12 Q. Thank you.

13 MS. ROWLEY: Can I have just a moment.

14 (Pause.)

15 MS. ROWLEY: Actually, I would like to see
16 Fletcher's letter one more time. Can I see the second
17 page.

18 Q. BY MS. ROWLEY: Looking at the, I think it's
19 the third paragraph from the bottom, we shall expect
20 freight, Mr. Fletcher has offered to send the drums of
21 scrap Pyranol that he can't use or that he's complaining
22 about in his letter back to GE. Is that something that
23 you had any conversations about with other people at GE?

24 A. I talked to Mr. Abbe about this whole issue of
25 paying for rejected material.

1 Q. And that was part of your analysis that it was
2 a cost --

3 A. That was part of the analysis that the cost to
4 determine what material was rejected, as far as Fletcher
5 was concerned, and what was good, was going to cost us
6 time -- take a person's activities away from his regular
7 job, send a chemist up there.

8 Q. So it was concluded that that was not an offer
9 you were interested in pursuing?

10 A. That's right.

11 MS. ROWLEY: Okay, thank you, Mr. Clark.

12 A. You're welcome.

13 THE COURT: Can you put up Defendant's
14 Exhibit 17 on the document camera again, Mr. Biagetti.
15 I want to ask you about some of the cost information
16 here. You say in the second to the last paragraph that
17 the value of the drum to GE at that time was a \$1.25 per
18 drum.

19 THE WITNESS: Yes.

20 THE COURT: And would that be based on your
21 personal knowledge or some research you had done at the
22 time?

23 THE WITNESS: That's research -- I found out
24 what the deposit amount was, and the \$1.25 was the
25 deposit that we lose on that.

1 THE COURT: Help me understand what that
2 means, the deposit amount.

3 THE WITNESS: When Monsanto sold us the
4 Pyranol -- Aroclor, he charged us a deposit for the drum
5 that we would get back if we returned the drum.

6 THE COURT: I see.

7 THE WITNESS: As opposed to returning the drum
8 our practice was to put scrap Pyranol into the drum and
9 sell the drums of scrap Pyranol to Fletcher.

10 THE COURT: I see. So that was the amount of
11 the deposit that you had been charged by Monsanto that
12 you would lose for every drum?

13 THE WITNESS: That's correct.

14 THE COURT: I see. Do you know whether that
15 would represent the going rate for a used drum,
16 55-gallon drum at that time?

17 THE WITNESS: I had a --

18 THE COURT: Because I know you bought some
19 used drums at various times you talked about, and I
20 wondered if you knew what the cost of the drums were.

21 THE WITNESS: I can't answer that question.
22 It's too far back.

23 THE COURT: You just don't remember.

24 THE WITNESS: I just don't remember all of the
25 arithmetic I went through for that.

1 THE COURT: The 50¢ per drum to dispose of
2 cost, was that based on some either pre-existing
3 knowledge you had or some research you did in connection
4 with this memo?

5 THE WITNESS: It was a reasonable estimate of
6 what it would probably cost us. I got that working with
7 Mr. Abbe and Mr. Barker.

8 THE COURT: All right, so in consultation with
9 them you arrived at --

10 THE WITNESS: We arrived at that number.

11 THE COURT: Okay. And the contemplation would
12 be for what kind of disposal at 50¢ per drum?

13 THE WITNESS: Whatever the chemical disposal
14 company's practice would be for disposing of it.

15 THE COURT: All right.

16 THE WITNESS: We would have no control over
17 what they did with it.

18 THE COURT: And as far as you know, then, at
19 the time that would have been the going rate for the
20 disposal of the 55-gallon drum of Pyranol.

21 THE WITNESS: Yes.

22 THE COURT: Okay, thank you. Mr. Biagetti, do
23 you have anything else?

24 MR. BIAGETTI: No. Thank you, Mr. Clark.

25 THE COURT: Thank you very much for coming,

1 sir, appreciate it, you're excused.

2 THE WITNESS: Thank you.

3 THE COURT: Do you have any other witnesses?

4 MR. BIAGETTI: No witnesses. We wanted to
5 call a couple of things to your attention.

6 THE COURT: Okay. You can do that.

7 MR. COWAN: Thank you, judge. I just wanted
8 to present a few documents for you to add to your
9 reading over the weekend.

10 THE COURT: Okay. The government's given me a
11 list of what you want me to read tomorrow. Have you
12 given me one yet?

13 MR. COWAN: Yes we have, judge, it's been
14 filed.

15 THE COURT: I just want to make sure I have
16 it.

17 (Pause.)

18 THE COURT: I've got it, okay.

19 MR. COWAN: Thank you, judge. So I just want
20 to offer into evidence for the court's consideration a
21 few documents.

22 THE COURT: Yes.

23 MR. COWAN: First of all, pursuant to the
24 parties' agreement we're going to introduce the expert
25 report of Dr. James Girard accompanied by his designated

1 deposition testimony. By agreement of the parties we
2 have designated experts by way of designations and their
3 reports. On that vein, judge, I know you're going to
4 read the whole expert report, because who could resist,
5 but I would point out --

6 THE COURT: I'm really looking forward to it.

7 MR. COWAN: Just a few things. The documents
8 will speak for themselves, but I think you will agree
9 after you read them that there's agreement among experts
10 on some key points here. His Honor has already alluded
11 to them. That the material, the Pyranol, scrap Pyranol
12 that Fletcher was receiving from GE was being used.

13 MR. FLYNN: Objection. This seems to be
14 beyond presenting what we agreed to, which is giving
15 your Honor copies of the reports and the depositions
16 that --

17 THE COURT: Yeah, but I'm not, I don't want to
18 waste a lot of time over it. Yes, draw my attention to
19 what you need to in the deposition and I'll ask you some
20 questions about it, so.

21 MR. COWAN: Fair enough, judge. To move this
22 along, we will submit the report, and the deposition
23 designations I think accurately draw the court's
24 attention to the issues we want you to consider.

25 THE COURT: And I'll talk to you more about

1 that. What I understand as of now is that there was a
2 limited market for Pyranol as sufficiently
3 uncontaminated as an Aroclor substitute to be used in
4 certain rubber-based paints, cement coatings and roof
5 coatings where it could be used as a plasticizer and/or
6 extender, and beyond that I'll look for the depositions,
7 although I think there's some substantial evidence in
8 the record to support the reference that the market was
9 an extremely limited one and that it was one in which
10 there was not substantial economic value associated with
11 the sale of contaminated Pyranol suggesting that the
12 market is extremely limited for it, but if the experts
13 have better evidence for me, I'll certainly listen to
14 what they have to say. I'm drawing my conclusions based
15 on GE's course of conduct, the price that was negotiated
16 for the used Pyranol, and the testimony I've received
17 concerning how Fletcher actually used it. I'll be
18 interested to see what the experts say about the extent
19 of the market for this, what kind of state it would have
20 to be in in order to be useful as a plasticizer or an
21 extender because those things may influence my
22 consideration, but until I read the depositions I won't
23 really know, and I'm sure I'll have some questions for
24 you about them when we have closing arguments.

25 MR. COWAN: Thank you, judge. Then moving

1 along we would like to offer into evidence for the
2 court's consideration Defendant's Exhibit 24 which I
3 believe is agreed upon. It's agreed upon, judge.

4 THE COURT: Can I have the clerk give me a
5 copy of it.

6 MR. COWAN: Yes.

7 THE COURT: You can put one up on the screen,
8 but I'd like to look at the document.

9 THE CLERK: 44?

10 MR. COWAN: 24.

11 THE CLERK: 24.

12 MR. COWAN: Your Honor, it's a multi-page
13 document showing ledgers or a series of ledgers for
14 calendar year 1957 with account receivables.

15 THE COURT: Okay, I've got it.

16 MR. COWAN: And you'll see at the bottom of
17 the page there, under sale scrap material, you'll see
18 Milford Paint Works. I represent to his Honor that you
19 will see the reference to Milford throughout this
20 document. I draw your attention to a page that has
21 Bates labeled GESP0000310MSJ showing an annotation at
22 the bottom of the page, letter A, indicating a letter
23 sent requesting check, and that letter also appearing at
24 Milford Paint Works referenced earlier in the documents.
25 Your Honor, we'd offer this to show that the time in

1 question is early 1957, GE was in fact diligently
2 pursuing its customer for debts owed and was not
3 allowing anything to languish, and was responsive to its
4 business relationship with its customer. Similar on
5 page GESP --

6 THE COURT: Yeah, when the time comes my sense
7 of the evidence is that the government has some limited
8 evidence that earlier in the 1950s, on at least one
9 occasion, that materials provided by GE to Fletcher at
10 no cost, but that otherwise throughout the relationship
11 until such time as there was a prolonged period of
12 non-payment by Fletcher, that GE did charge Fletcher for
13 the Pyranol that he was taking, that he took it. There
14 is some testimony to suggest that there were informal
15 allowances made during certain phases of the proceeding,
16 but that the evidence suggests to me that GE did
17 consistently charge Fletcher for the material that
18 Fletcher was taking away.

19 MR. COWAN: All right, judge, we'll move on
20 then. Just again to get into the record Defendant's
21 Exhibit 29, agreed upon by the United States, which is a
22 label from a Webtex roof coating product. His Honor has
23 made the point that there's evidence in the record that
24 material purchased by Fletcher had used and was used in
25 some roof coating materials. We also note that Webtex

1 was purchasing significant amounts of scrap Pyranol that
2 Fletcher purchased from General Electric. We'd offer
3 that as evidence of Webster's and Webtex's product in
4 the marketplace, and it's also useful as his Honor
5 considers the expert testimony.

6 THE COURT: But it doesn't list specifically
7 the ingredient in there, right?

8 MR. COWAN: That's correct, judge, cannot make
9 that representation.

10 MR. FLYNN: I do want to, your Honor --

11 THE COURT: It's guaranteed free from coal
12 tar, though.

13 MR. COWAN: Can't be that, judge.

14 THE COURT: I had a lot of those cases going
15 back into the 1880s here, so this case is like brand new
16 compared to some of the cases.

17 MR. FLYNN: Your Honor, I just want to point
18 out that the United States has not objected to this
19 exhibit, but we have pending before you a motion in
20 limine to restrict expert testimony concerning the whole
21 topic of roof coating.

22 THE COURT: All right, well, we will get to
23 that if we go through his documents. What else do you
24 want to show me?

25 MR. COWAN: Just very quickly, judge,

1 Exhibit 30. Again, this is a United States Patent
2 Office, Defense 30, agreed upon by the parties showing a
3 trademark by Webtex and again listing for a coating for
4 application for billing services including water,
5 roofing liquids for roof, foundations, et cetera.

6 Again, for evidence of the manner in which Webtex was
7 using this material, again helpful as his Honor
8 considers the expert's testimony. Moving along.

9 MR. FLYNN: Your Honor, just --

10 THE COURT: It's the same.

11 MR. FLYNN: Yes.

12 MR. COWAN: Thank you, judge. Moving along,
13 Defendant's Exhibit 34, also agreed upon, this is a
14 document taken from Monsanto's materials indicating for
15 the year '63 through '71, plasticizer applications,
16 forgive me, plasticizer applications for Aroclors were
17 the second most common use or at least sales by Monsanto
18 during that period.

19 THE COURT: All right, let me look at this.

20 That sounds interesting.

21 (Pause.)

22 THE COURT: Now, my question to you is, can I
23 infer from this that plasticizer applications are
24 plasticizers that consist of Aroclor, or are there
25 non-PCB plasticizers, because Monsanto made a ton of

1 different chemicals.

2 MR. COWAN: Yes it did, your Honor, and they
3 were quite good at it. They did well by themselves. I
4 next offer --

5 THE COURT: Well, but can you tell me, I mean,
6 when it says plasticizer applications --

7 MR. COWAN: Yes, your Honor.

8 THE COURT: It did make, say, for example, in
9 1963 it sold thousands of pounds, 9,181 pounds, so 9,181
10 pounds of plasticizer, but does that mean it sold that
11 amount of Aroclor, or does that mean it sold
12 plasticizers of a variety of kind, only one of which was
13 maybe Aroclor, which we don't know how much of it was
14 plasticizer.

15 MR. COWAN: Yes, your Honor, no dispute there,
16 we have entered into or offered for the court's
17 consideration testimony of William Papageorge, a
18 Monsanto technician chemist, who speaks about Monsanto's
19 Aroclor business -- excuse me, its plasticizer business
20 and how significant it was for the company and the
21 material, the kind of plasticizers that the company
22 offered.

23 THE COURT: So you have a deposition you want
24 me to read that tells me more about that?

25 MR. COWAN: Yes, your Honor.

1 THE COURT: All right, and did you want to say
2 something?

3 MS. ROWLEY: I just want to clarify that there
4 are many different types of Aroclors and the ones that
5 GE was using were not necessarily the kind that Monsanto
6 was selling for use at that time.

7 THE COURT: All right.

8 MR. COWAN: I refer his Honor to Mr.
9 Papageorge's testimony and the expert's testimony.

10 THE COURT: All right.

11 MR. COWAN: One second, your Honor.

12 THE COURT: Yup.

13 (Pause.)

14 MR. COWAN: Your Honor, thank you, I believe
15 that's it.

16 THE COURT: Okay. You want to take up some
17 objection you have to their expert deposition?

18 MR. FLYNN: We actually have two pending
19 motion in limine's before your Honor. One is related to
20 this whole roof coating issue and their expert, Dr.
21 Girard, and then we have a --

22 THE COURT: All right, well, let's go. I've
23 got to rule on it, right, I've got to read the
24 deposition today so I'm going to decide whether I'm
25 going to keep it out. What do you want to say about it?

1 MS. ROWLEY: It's just a short point that we
2 made in the motion. We had a motion to strike at the
3 summary judgment stage certain evidence that GE never
4 relied upon, inadmissible hearsay. They haven't really
5 briefed any different evidence to show that Webtex was
6 using the scrap Pyranol in roof coating. We agree it
7 was used for something, we don't know what --

8 THE COURT: Does your motion depend upon your
9 assertion that there is no evidence to permit a
10 conclusion that the Webtex, whatever the name of the
11 predecessor, was getting Pyranol from Fletcher?

12 MS. ROWLEY: No, we agree they were getting
13 Pyranol from Fletcher.

14 THE COURT: Okay.

15 MS. ROWLEY: We just don't agree that, you
16 know, we can identify what they were using it for at the
17 end of the day, so therefore any expert testimony on
18 specific roof coating specifically is irrelevant.

19 THE COURT: I don't think it particularly
20 matters all that much. The point is, they were buying
21 it because they could use it in their product. One of
22 their products was roof coating. It's logical they
23 probably used it as a roof coating additive, but --

24 MS. ROWLEY: And it's also irrelevant because
25 GE didn't know about the sales to Webtex.

1 THE COURT: Yeah, but you brought in a whole
2 lot of evidence about what's happening at the site and
3 didn't tie any of it to what GE knew, so, I'm going to
4 receive it depending, you know, I won't necessarily
5 assign any significant weight to it, but I'm not going
6 to exclude it for that reason. So if the arguments are
7 that I should exclude the evidence concerning Webtex
8 because there isn't sufficient evidence to permit a
9 conclusion that Webtex is using the Pyranol it obtained
10 from Fletcher in a roof product as opposed to something
11 else, I overrule that objection, and if the -- I forget
12 now, your second argument was?

13 MR. FLYNN: We also have pending a motion in
14 limine to completely exclude the testimony of Neil
15 Shifrin who's another expert of GE.

16 THE COURT: And why do you want to exclude
17 him?

18 MR. FLYNN: Turn to my colleague.

19 MS. FISKE: We don't think that he's qualified
20 as an expert or that his opinions will help you resolve
21 the issues that are in dispute.

22 THE COURT: Why?

23 MS. FISKE: For the reasons stated in our
24 papers.

25 THE COURT: I know, but I want you to tell me

1 why.

2 MS. FISKE: Well, for one thing he talks -- he
3 talks about the lack of environmental regulation during
4 the relevant time period. I think all he's stating is
5 something that's really a matter of common knowledge.
6 You've indicated yourself, you know, by reference to
7 stories growing up in Woburn, he's not adding anything,
8 and he doesn't talk whatsoever --

9 THE COURT: I grew up in Acton, not Woburn.

10 MS. FISKE: I'm sorry, I'm thinking civil
11 action. So, you know, that's common knowledge. You
12 don't need an expert to tell you that. And he does not,
13 even though he's purporting to talk about environmental
14 regulation at the time period, he does not mention any
15 of the laws regarding regulation of the Hudson River
16 that were in place at the time.

17 THE COURT: Is he being offered to stand for
18 the proposition that there weren't any restrictions?

19 MS. FISKE: He says virtually unregulated.

20 THE COURT: I think it was virtually
21 unregulated.

22 MS. FISKE: Right.

23 THE COURT: So I don't think it's going to be
24 a problem. I mean, it's ironic because earlier on they
25 wanted to introduce evidence that it was regulated and

1 illegal in the early seventies. Most of the time this
2 was going on there were very little restriction on GE's
3 ability to dispose of this waste in any way it chose.
4 The clean water act hadn't been enacted. Most local
5 regulations didn't bar disposing of waste in rivers.
6 People who lived in Concord, New Hampshire in the 1950s
7 and 60s would tell you that this Merrimack River was so
8 polluted that in fact it did catch fire periodically.
9 People were regularly depositing all kinds of hazardous
10 substances in the river and not being held to account
11 for it. GE acknowledges that it was dumping lots of
12 Pyranol into the Hudson River and -- so I don't think it
13 really matters. I'll look at it. But if that's all it
14 is, that's not going to be a problem. Anything else?

15 MS. FISKE: Well, here's two more opinions
16 that we don't think are going to assist the court. His
17 second opinion is the transportation of NQ which is what
18 he calls scrap Pyranol over long distances at Fletcher's
19 expense was not consistent with the means of disposal of
20 industrial waste readily available to GE at the time,
21 when the disposal of such waste, including those
22 contaminated PCBs, was effectively unregulated.

23 THE COURT: Well, in theory they could have
24 dumped it in the river, so why did they transport it
25 over a long period of time. The answer is, because they

1 could get somebody to pay them for it. That's the
2 answer to that. That's the end of the story.

3 MS. FISKE: Why do you need an expert for
4 that?

5 THE COURT: Well, but, so what? To the extent
6 he says that, his argument is completely unpersuasive.
7 So, if I don't think it makes any sense, I'm not going
8 to adopt it anyway.

9 It's obvious, why would they send Pyranol all
10 across state lines? Because Fletcher was willing to pay
11 for it. Why did they do that? They could have gotten
12 rid of it, even in the late 1960s for 50¢ a drum,
13 according to GE's expert, so yeah, they could get rid of
14 it relatively cheaply, but they could get rid of it and
15 make some money on the side while they were getting rid
16 of it by paying this guy to take it.

17 MS. FISKE: His third point, your Honor, is
18 equally unpersuasive. He says the nature of the
19 transaction between GE and Fletcher was consistent with
20 a sale, paren, GE and purchase, paren, Fletcher's of a
21 useful product, meaning scrap Pyranol. That ultimately
22 goes to the conclusion --

23 THE COURT: I think they didn't bring him in
24 here for a reason because, I mean, it wouldn't really
25 withstand careful analysis. It either does or doesn't

1 -- the expert isn't going to -- I mean just because --
2 there are many styles of argument. One style of
3 argument is called argument by authority, and that is
4 you bring somebody in and say I am an authority and I
5 say it's true and therefore it is. Well, I don't find
6 argument by authority persuasive. If it doesn't make
7 sense to me, I'm not going to believe it, and I don't
8 care who you are. I feel I can understand whatever kind
9 of expert testimony people are going to produce, and if
10 I don't, if what you say doesn't make sense, I don't
11 care what your qualifications are, I'm not going to
12 accept it. And just saying I'm an expert, it's
13 consistent with sales, that doesn't really tell me much.
14 So I'll read his deposition. If it's persuasive to me,
15 I'll consider it, but I'm not going to exclude it, I'm
16 just going to say I don't really buy it.

17 MR. BIAGETTI: May I make one comment in
18 response because it may save you some time. We made a
19 proposal to the government and I'll reiterate it here.

20 There's only one strand of one argument that I
21 think is anywhere in the government's case, and frankly
22 it's more in the pretrial pleading, the proposed
23 conclusions of law than I heard at the presentation of
24 the evidence, that Dr. Shifrin would still need to rebut
25 the report and deposition if you decided so, judge, and

1 it's this. The government asked you to conclude as a
2 matter of law that given the promulgation of laws and
3 regulations governing and limiting the discharge of
4 hazardous substances into water bodies such as the
5 Hudson, GE was forced to consider other cost effective
6 disposal methods for scrap Pyranol.

7 We don't think the case is about discharges of
8 hazardous substances --

9 THE COURT: Who's saying that?

10 MR. BIAGETTI: The government is asking you to
11 conclude that at -- at proposed conclusion -- the
12 government is making that argument at --

13 THE COURT: Well, I expect the government to
14 show me here's the New York State law that would have
15 barred him from putting it in the river that was in
16 effect at the time. Here's the local ordinance that
17 would have barred him from dumping it. Here's the
18 federal law that addresses this. So if GE wanted to
19 behave lawfully, it couldn't do that and therefore it
20 had to find an alternative. That didn't require an
21 expert. That's just here, show me the law. I'm sort of
22 the expert in the law here. Just bring it to my
23 attention and I'll look at it and I'll see whether there
24 were in fact laws in place. I don't understand that
25 ordinarily to be the case because I represented so many

1 companies who had wastes in the 1950s and 60s where the
2 product, recommended disposal of the product was dig a
3 trench into the ground, pour the stuff into the ground
4 and cover it over, and that's the way it worked. Now,
5 maybe there were laws in place that I'm not aware of in
6 the fifties and sixties, but that's not the way -- I
7 don't think they were in New Hampshire because in New
8 Hampshire that's the way they did things. They just dug
9 a trench or they put a punch of barrels in the ground,
10 took a bulldozer and ran over them and pushed dirt over
11 it. That's how they would do it.

12 MR. BIAGETTI: And your recap is the essence
13 of Dr. Shifrin's report on that subject which I think is
14 all --

15 THE COURT: Maybe New York law is different.
16 I don't think there are any federal laws. Were there
17 any federal laws that barred disposal of hazardous
18 waste?

19 MS. FISKE: Well, we intend to -- the answer
20 to your question is the Refuse Act 1899 and then there
21 are also New York laws, but we don't intend to make this
22 significant argument at our closing and we do intend to
23 present it just exactly as you have said, by citing to
24 the laws themselves. You are the expert in the laws,
25 not Dr. Shifrin, who by the way has never been to law

1 school.

2 THE COURT: I'm interested in -- I'm more
3 interested, frankly, maybe the parties didn't get this,
4 what would have been interesting to hear, I'm an expert
5 in paint, and I've looked back over 50 years and I've
6 looked at the formulas for paint and I know the market
7 shares and I know what paint products are made and I
8 know how you make plasticizers and I know how you make
9 roof coatings, and to the extent Aroclors were used they
10 had to be this kind of purity, and without that kind of
11 purity you couldn't put it in the product, it wouldn't
12 work and nobody would buy it, you know, and if you've
13 got an expert like that, that would be interesting.

14 MS. ROWLEY: That's our expert.

15 THE COURT: Okay, well, good, I'll be
16 interested. That's worth reading because that requires
17 an expertise that I don't have.

18 MR. COWAN: It is good reading, judge, but
19 read his report, then read his deposition. Now that's a
20 good read.

21 THE COURT: Okay.

22 MR. COWAN: Also respectfully, judge, the
23 report of Dr. James Girard, I apologize to your Honor, I
24 inadvertently left off the list of exhibits we ask you
25 to read, but the parties have agreed to it by agreement,

1 so with that friendly amendment I believe we're all set.

2 THE COURT: Okay, the defense rests.

3 MR. COWAN: Yes.

4 THE COURT: The objections to the
5 admissibility of the expert's depositions that the
6 government has raised I will take under advisement and I
7 will read the depositions and I will make a final ruling
8 after reading the depositions. My inclination is,
9 frankly, is to deny the motions to exclude, but I'll see
10 what the people have to say. In denying the motions to
11 exclude doesn't mean I'll choose to credit the
12 depositions. I may find what they have to say not
13 credible, or I may find what they have to say credible
14 but doesn't require really expert analysis but just
15 states something that is already evident under the
16 circumstances.

17 So, I will, unless anybody wants to say
18 anything more today, my plan is to have all your
19 exhibits brought up into my office. Take your lists,
20 sit down and read every exhibit that the government has
21 asked me to read, every deposition the government has
22 asked me to read, and read every exhibit the defendant
23 has asked me to read and every deposition that the
24 defendant has asked me to read, and I'll do that
25 tomorrow and if necessary over the weekend, then Monday

1 you will come prepared to make final arguments.

2 I do have to say I've read the government's
3 memorandum on the legal standard and I'm not inclined to
4 change my view. I think the government's current
5 position is not that far from my view, but it is a
6 different view. I would take the view that you have,
7 and you've used this term, the government has,
8 constructive knowledge. The way I see it, it's
9 something that you would call an alternative form of
10 intent that the law sometimes refers to as constructive
11 intent. In other words, if the arrangement is an
12 arrangement for the transfer of waste under
13 circumstances where the defendant understands and agrees
14 that the waste will be, some of it used for useful
15 purpose and some of it will be discarded in ways that
16 qualify as disposal under the statute, that that is an
17 arrangement for disposal, and, but I am not willing to
18 go so far as what I think the government is suggesting,
19 is that even if under the circumstances the defendant
20 didn't know that disposal was substantially certain to
21 result, but if under the circumstances it reasonably
22 should have known that, that it's chargeable with
23 liability because I find no support in the case law for
24 that view and I don't think I can square it with the
25 statutory construction, and I think the government just

1 takes a very expansive view of the concept of statutory
2 construction. I am essentially a textualist. I
3 believe in construing the text of the statute in
4 context. I try to determine what the objectively
5 manifested purpose of the statute would be. The
6 government's approach seems to be CERCLA has a purpose
7 to clean up the environment and make polluters pay. If
8 there are two possible interpretations, one of which can
9 be construed to enhance the ability to make polluters
10 pay, then that's what we're going to adopt, and I don't
11 think there's even -- I don't even think the statutory
12 language can be stretched that broadly, and I don't
13 think any court would stretch it that broadly. There
14 may be good public policy reasons to do so, but that's
15 the difference between the Congress and the judiciary.
16 The Congress decides how to amend statutes to make them
17 more effective. The judiciary applies the statutes and
18 construes the statutes reasonably in light of the
19 purpose of the statute, but must attend carefully to the
20 language, and I don't see how an arrangement can be an
21 arrangement for disposal unless the arranger either had
22 disposal as an objective, or the arranger knew,
23 understood that the disposal was substantially certain
24 to result from the arrangement, and I think in that
25 sense I am agreeing with what I understand the

1 defendant's position to be on the statute, and I am not
2 persuaded by the government's position. So you should
3 keep that in mind when you present your arguments. Yes.

4 MR. COWAN: Your Honor, I apologize, just one
5 small housekeeping matter if his Honor --

6 THE COURT: Yes.

7 MR. COWAN: On the identification of those
8 exhibits you asked us to bring to your attention, I
9 asked for friendly amendment of the Girard report. One
10 final, and perhaps it's oversight, the parties have a
11 stipulation that all expert testimony by way of
12 deposition, their reports would be entered into
13 evidence. I just took a quick glance. They have
14 another expert, Mr. Portfolio. I didn't see it on their
15 list presented to the court, so I just want to add that
16 to our list and I'll file an amendment for your
17 consideration.

18 THE COURT: You want me to read their
19 deposition, their expert's deposition?

20 MR. COWAN: I want you to read their roof
21 coating expert's report.

22 THE COURT: All right, so you want me to read
23 what from Portfolio?

24 MR. COWAN: They didn't designate anything
25 even though we have a stipulation that we were going to

1 do so.

2 MR. FLYNN: There's no deposition for
3 Portfolio. There's a report that they listed as an
4 exhibit and we said, you know, you can read it.

5 THE COURT: Okay, so you want to add
6 Portfolio's report to the list of things you want me to
7 read.

8 MR. COWAN: Yes. So if it's okay with you,
9 judge, I'll file an amendment which lists Mr.
10 Portfolio's report and Mr. Girard's which I think is
11 honest and reflectful of our agreement.

12 THE COURT: That's fine. Here's what you're
13 going to do. I'm going to leave in a minute and then
14 you're going to stand here with my clerk and make sure
15 everything that you want me to read is on a cart or
16 carts that he's going to bring up to my office, and that
17 your lists, you'll actually take the lists, and if you
18 need to physically write on them to add what needs to be
19 added to it, and then the clerk will bring up on carts
20 the binders containing the exhibits they want me to
21 read, and for the defendants I think as their exhibits
22 are presented separately, those exhibits that they want
23 me to look at, with the currently updated lists that
24 each side wants me to look at, and then I will come in
25 Friday morning and start reading. And then you can

1 present your oral arguments. As I said, I am already --
2 so the defense has rested. The evidence in the case is
3 complete. I am quite satisfied that there is persuasive
4 evidence, and certainly the government can't prove to
5 the contrary that Fletcher did use scrap Pyranol in a
6 small percentage of its operations and did transfer to
7 third parties an amount of scrap Pyranol and --

8 MS. FISKE: We conceded that in our summary
9 judgment papers.

10 THE COURT: Okay, so that's basically -- that
11 issue is done. So the question then becomes,
12 notwithstanding that, was this an arrangement for
13 disposal because even if GE understood and agreed that
14 some of the Pyranol would be used in productive ways,
15 its agreement with Fletcher is such that it qualifies as
16 an arrangement for disposal because GE knew and
17 understood that not all of it would be able to be used
18 and that substantial quantities of it would have to be
19 disposed of, and it knew that at the time it went into
20 the arrangement and during the time the arrangement was
21 continuing to be in place, and on that basis it meets
22 the standard. That's what I understand the argument
23 that the government is going to present to me.

24 The argument I understand that the defendant
25 is going to present to me is in GE's view the

1 arrangement was an arrangement to transfer Pyranol for
2 use in a series of products, a productive use that would
3 earn him money other than a use that would qualify as a
4 disposal, and that importantly the government can't
5 prove otherwise because it's the government's burden.
6 So you've got to present an argument to try to
7 demonstrate to me that the Pyranol, there was a market
8 for it, Fletcher was paying for it, Fletcher was making
9 statements suggesting that he had uses for it, the
10 circumstances under which it was transferred suggests
11 that it was going to be used, not disposed of, the
12 Pyranol was sufficiently clean to be useable for the
13 alternative purposes that Fletcher was putting it to.
14 GE had no basis on which to know and understand during
15 the course of the agreement that this would be disposed
16 of. Fletcher never told them he was disposing of it.
17 There is simply no persuasive evidence that he was in
18 fact disposing of it. That's what I understand your
19 argument's going to be. Try to marshal the facts in
20 evidence to support that view, and I'll hear from the
21 government, then I'll hear from the defendant, and then
22 we'll go from there, although, I mean, I can switch the
23 order of argument if you want. I mean, it is usually
24 the party with the burden of proof gets to go last, but
25 it might make sense for the government to just present

1 its argument and then the defendant. It may make more
2 sense for me because --

3 MS. FISKE: If you'd prefer.

4 THE COURT: Yeah, I think that makes more
5 sense because I'm going to be asking a series of
6 questions, and then after the defendant's done, if you
7 have some kind of need to respond to something they've
8 said, I'll certainly hear you on that. It's going to be
9 a much less formal approach to argument than you would
10 present in front of the jury.

11 MS. FISKE: We'll plan on that.

12 THE COURT: Okay. And I hope we won't spend
13 too too long, you know, I'm certainly willing to spend
14 an hour with each of you and longer if we need to, but I
15 hope we can wrap that up in the morning on Monday and
16 then I can give you a decision and move on to the next
17 case I've got to work on.

18 All right, anything else we need to cover
19 today?

20 MR. BIAGETTI: Nothing.

21 THE COURT: Okay. Thank you. So work with my
22 clerk and make sure you get everything I need organized.

23 (Adjourned at 3:00 p.m.)

24

25

1 C E R T I F I C A T E

2

3 I, Sandra L. Bailey, do hereby certify that
4 the foregoing transcript is a true and accurate
5 transcription of the within proceedings, to the best of
6 my knowledge, skill, ability and belief.

7

8

9 Submitted: 2/6/09 /s/ Sandra L. Bailey
10 SANDRA L. BAILEY, CSR, CM, CRR

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